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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL ROBERT SALAZAR,

Defendant and Appellant.

D058783

(Super. Ct. No. FVI800058)

APPEAL from a judgment of the Superior Court of San Bernardino County, Eric M. Nakata, Judge. Affirmed.

The sole issue on appeal is whether the trial court abused its discretion in declining Angel Salazar's request to dismiss at least one of his two strike prior convictions to avoid a life sentence. We find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Salazar was charged with two counts of murder and one count of possession of a firearm by a convicted felon, with various enhancement allegations including that the offenses were committed to benefit a gang. The jury convicted Salazar of the firearm

possession charge (Pen. Code, § 12021, subd. (a)(1)), but found the gang enhancement not true for this offense. The jury deadlocked on the murder charges, and the court dismissed these charges.¹ In a bifurcated proceeding, the jury found that Salazar had incurred two prior strike convictions. At sentencing, Salazar requested that the trial court dismiss at least one of his strike priors so he could avoid a life sentence. The court declined his request and sentenced him to 25 years to life in prison.

Salazar's two strike offenses occurred on September 18, 1995, when he was 16 years old. Salazar was charged as an adult, and he pled guilty to attempted robbery, and to kidnapping with an enhancement for personal use of a firearm. The offenses to which he pled guilty were against a single victim.² He was sentenced to eight years eight months in prison, consisting of five years for the kidnapping, three years for the firearm use, and eight months for the attempted robbery. He entered prison in 1997. While in prison in 1997 and 1998, he completed vocational courses in a refrigeration/air

¹ Salazar was prosecuted in two consecutive trials. At both trials the jury deadlocked on the murder charges, and after the second trial the trial court granted the prosecution's motion to dismiss the murder charges.

² The record does not contain a detailed description of the facts of the prior strike offenses. The record includes a complaint filed against Salazar alleging that on September 18, 1995, he committed two counts of kidnapping for robbery (victims Anthony Diaz and Alexander Valiente) and one count of attempted murder (victim Diaz), with enhancement allegations of personal use of a handgun, personal use of a shotgun, and personal infliction of great bodily injury on Diaz. The plea agreement states that Salazar admitted one count of the lesser included offense of kidnapping, personal use of a firearm in the kidnapping, and (based on an amended complaint) one count of attempted robbery, which counts pertained to victim Diaz. The district attorney agreed to a maximum 11-year sentence and dismissal of the remaining charges. The offenses were apparently committed with a 26-year-old codefendant.

conditioning program. In 1999 he was placed in a security housing unit for one year due to fighting. In 2002 while in prison, he received his General Educational Development (GED) certificate.

Salazar was released from prison in February 2004. In November 2005, he drove while intoxicated, and for this offense was convicted of misdemeanor driving under the influence (DUI) and placed on three years' probation. At a parole revocation hearing in December 2005, he was continued on parole. He completed an alcohol program and made monthly payments for the DUI offense.

On February 23, 2007, at age 28, he was discharged from parole. Ten months later, in December 2007, the authorities found him in possession of two guns. Due to his commission of a new offense, his probation was revoked for the DUI offense.

The events giving rise to the gun possession offense occurred while the police were investigating the homicide of two men who, on the morning of December 30, 2007, were found shot to death at their residence. That same day, Salazar agreed to be interviewed by the authorities concerning the shootings. Salazar told a detective that he did not own a gun, but his wife owned a rifle that was at their home. He stated he had gone shooting in the desert a few days earlier with friends. Forensic testing showed gunshot residue on his sweatshirt.

Concerning his whereabouts at the time of the homicide, Salazar told the detective that on December 29 he had been with his wife and daughter at a birthday party. When they came home his wife wanted to go to bed, while he still wanted to "party" and drink. He left his home in the early morning hours of December 30, went to a store and bought

beer, and decided he wanted to "get some dope." He drove to the victims' residence with the intention of getting "crack and weed." However, when he pulled into the driveway he changed his mind because he thought his wife would find out. He drove away and instead went to a bar where he drank beer.

During a search of Salazar's residence on December 30, 2007, the authorities found two guns in the bedroom shared by Salazar and his wife. There was a loaded shotgun located between the box spring and mattress of the bed, and a rifle in the closet. According to information in the probation report, the guns were legally registered to Salazar's wife.

A sheriff's department inmate classification form filled out on December 31, 2007, states that Salazar is a self-admitted member of the Westside Verdugo Gang. When interviewed by the authorities, Salazar stated he grew up with Verdugo gang members but claimed he never joined the gang. Nevertheless, he acknowledged that while in prison he was tattooed with the gang name " 'Verdugo' " and that he "was putting in work" and got into fights. He told a detective that while in prison he had to do what the gang said, but he ultimately did not want to be part of the "bullshit." While in jail for the current offense, he was found in possession of two prohibited items; i.e., a shaving razor and pruno (inmate-made alcohol).

Salazar told the probation officer that after his release from prison, he became productive and held a job. He stated that he is "a father, a brother, and friend to people," and he regrets being misled at a young age and his poor life decisions. A parole officer

who supervised Salazar in 2006 testified at trial that during this supervision period Salazar was employed and no gang indicia were observed at his residence.

To support his request for dismissal of at least one strike, Salazar submitted information (including numerous support letters) reflecting that after his release from prison, he maintained employment, married, and became dedicated to caring and providing for his family. Defense counsel argued dismissal of one or more strikes was warranted because Salazar was very young when he committed the strike offenses; the strikes arose out of the same course of conduct and were against the same victim; his criminal history after his release from prison was minimal; and he was cooperative with the police. Further, his current possession offense was a nonstrike offense and it would not even be an offense if he was not an ex-felon. Salazar submitted a letter to the court stating that his strike offenses were "one of the biggest mistakes" of his life; he was sent to prison when he was 18 years old; and he did his best to educate himself in prison although he still made bad decisions (such as getting his tattoos). He stated that after he was released from prison, he worked hard, got married, and became a father, and never "stole, robbed, or sold drugs." However, he now recognized he was still immature in many ways and due to life stresses he started drinking and used drugs. He told the court he had matured since his most recent arrest, and he knew he had to go to prison but requested that the court not give him a life sentence.

In opposition, the prosecutor argued that Salazar knew he was not supposed to possess firearms and there was no justification for his possession. The prosecutor noted that his strike offenses involved actual physical confrontation with the victim, and

because he used a firearm during the prior kidnapping his "present [possession] offense takes an even more serious bent." The prosecutor also noted that Salazar committed the gun possession offense less than one year after he was discharged from parole.

When deciding not to dismiss any of the strikes, the court reasoned that the circumstances of the strike offenses and the current offense involved a firearm. The court stated: "I have to look at what it is that he did versus what it is that he is convicted with. . . . [I]f he were convicted of a drug offense, petty theft [with] a prior, something of that nature, I would have no hesitation in granting the [dismissal request]. However, given the fact that Mr. Salazar in the [prior] crime . . . — albeit while he was a teenager — used a gun, this case involves guns. I can't take that chance on him. I don't think society can take that chance on him. [¶] And though he has a family that love him and I think that he could be a productive human being, the danger that he presents outweighs those positive factors in his life. . . ."

DISCUSSION

The purpose of the Three Strikes law is to protect the public from recidivist offenders by imposing extended punishment on offenders who have previously committed violent or serious felonies and who again commit a felony. (*Ewing v. California* (2003) 538 U.S. 11, 25-26; *People v. Strong* (2001) 87 Cal.App.4th 328, 337; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1329-1330.) "[T]he three strikes law . . . establishes a sentencing norm, [and] carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. . . . [T]he law creates a strong presumption that any sentence that conforms to

these sentencing norms is both rational and proper." (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*)). However, a trial court may dismiss a strike prior conviction if, in light of the nature and circumstances of the current and prior felony convictions and the particulars of the defendant's background, character, and prospects, the defendant is deemed outside the spirit of the Three Strikes law in whole or in part. (*Id.* at p. 377.)

On appeal, we review the trial court's decision for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 374.) The burden is on the defendant to clearly show that the sentencing decision was "so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.) The decision will not be reversed merely because reasonable people might disagree; an appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. (*Id.* at p. 377.) Rather, the court's ruling is an abuse of discretion only in an "extraordinary case" when the "relevant factors . . . manifestly support the striking of a prior conviction and no reasonable minds could differ" (*Id.* at p. 378.)

Here, Salazar committed two strike offenses in his youth during which he endangered the life of the victim by personally using a gun. He went to prison for about eight years for these offenses, and after his release he was forbidden from possessing a gun. The Legislature has determined that public safety compels this prohibition on gun possession. As explained in *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037-1038: "As a matter of public policy, the Legislature has made it a crime for convicted felons to possess firearms. . . . The purpose of this law is to protect public welfare by precluding

the possession of guns by those who are more likely to use them for improper purposes. [Citation.] Due to the potential for death or great bodily injury from the improper use of firearms, public policy generally abhors even momentary possession of guns by convicted felons who, the Legislature has found, are more likely to misuse them."

Only 10 months after Salazar was discharged from parole, he was found in possession of two guns in the bedroom of his home, at least one of which was loaded. Further, he used a gun in a recreational setting. These actions reflect that, less than a year after being freed from the supervision of his parole officer, he made a choice to ignore the strict prohibition against gun possession placed upon felons. The record reflects the trial court would have likely dismissed one or more strikes if Salazar's prior and/or current offenses were *not* gun related. Instead, the court recognized that the circumstances of his prior strikes and the instant offense involved his possession of a gun, and concluded that his current gun possession showed that he still posed a serious danger to society warranting full punishment under the Three Strikes law.

Given the high level of threat to human life posed by guns, and Salazar's decision to ignore the gun possession prohibition placed upon him, we cannot say that no reasonable person could come to the conclusion reached by the trial court. (See *People v. Myers* (1999) 69 Cal.App.4th 305, 308-310 [when sentencing for gun possession conviction, court did not abuse its discretion in declining to dismiss prior strikes that were committed 14 years earlier and on one occasion; relevant factors considered by trial court included fact that prior and current offenses involved potential for violence].)

To support his challenge to the trial court's refusal to dismiss at least one strike, Salazar cites the California Supreme Court's statement suggesting (without deciding) that when two strike priors arise from a *single act*, as opposed to multiple acts during a *single indivisible transaction*, it could in some cases be an abuse of discretion not to effectively count the two strikes as one strike by dismissing one of the strike priors. (*People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8; see also *People v. Scott* (2009) 179 Cal.App.4th 920, 928; *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1216-1217.) However, the record sheds no light on whether the incident giving rise to Salazar's two strike offenses consisted of a single, unitary act of kidnapping and attempted robbery, as opposed to a series of acts that could have endangered or traumatized the victim during an ongoing event. Absent a showing that his two strike priors arose from only one act, Salazar has not presented grounds that arguably might compel the striking of at least one of the strike priors.

Salazar also notes that because he committed his strike offenses on a single occasion, he is not in the same position as a recidivist offender who committed strike offenses on two separate occasions and thereby demonstrated that he or she has not "'drawn the proper lesson'" from his previous punishment. Although Salazar's two strike offenses occurred on the same occasion, he nevertheless engaged in conduct that supported imposition of two distinct convictions. For purposes of the Three Strikes law, the significant factor is not the singularity of the occasion but rather "the fact that [the] prior criminal conduct yielded *two convictions*." (*People v. Benson, supra*, 18 Cal.4th at pp. 34-35 [defendant could properly be sentenced under Three Strikes law even though

two prior strike offenses involved single objective giving rise to stayed sentence under Pen. Code, § 654].) A defendant who committed an initial violent or serious felony, and during that same criminal event committed an additional violent or serious felony, can properly be viewed as a greater threat than a defendant who committed only one such previous offense. (See *Benson, supra*, at p. 35.) Further, notwithstanding the fact that Salazar's two prior strike offenses occurred on the same occasion, the trial court could reasonably conclude that he has not learned from his previous punishment because he blatantly ignored the gun possession prohibition and instead chose to possess, and even use, a firearm.

Finally, Salazar cites the facts that he committed the strike offenses when he was only 16 years old; while in prison he completed his GED and other training programs; his only other offense was misdemeanor driving under the influence; he was discharged from parole without having returned to prison for a parole violation; he was steadily employed after his release from prison; and his current offense was not a serious or violent felony. These were relevant factors for the trial court to consider. However, because the court could reasonably decide not to dismiss a strike based on the common gun-related characteristic of the past and current offenses, none of these factors compelled the court to reach a contrary conclusion.

The trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.